

1  
2  
3  
4  
5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 CEN COM INC., a Washington corporation  
9 d/b/a American Digital Monitoring,

10 Plaintiff,

11 v.

12 NUMEREX CORP., a Pennsylvania  
13 corporation; NEXTALARM, LLC, a Georgia  
14 limited liability corporation, and DOES 1-10,  
15 Defendants.

CASE NO. C17-0560RSM

ORDER DENYING PLAINTIFF'S  
MOTIONS FOR SUMMARY JUDGMENT  
AND MOTION TO DISMISS

16 **I. INTRODUCTION**

17 This matter comes before the Court on the following motions:

- 18 1. Plaintiff's Motion for Summary Judgment, or in the Alternative, Summary  
19 Adjudication, on Defendants' Counterclaims (Dkt. #112 (filed under seal));  
20  
21 2. Plaintiff's Partial Motion for Summary Judgment Finding Defendants' Breach of  
22 Contract (Dkt. #117 (filed under seal)); and  
23  
24 3. Plaintiff's Motion to Dismiss and to Strike Defendants' New Counterclaim (Dkt.  
25 #146).

26 On these motions, Plaintiff argues that the undisputed material facts in this matter  
27 support summary dismissal of all of Defendants' counterclaims. Dkts. #112 and #146. Plaintiff  
28 further argues that Defendants' Washington Consumer Protection Act counterclaim should be  
29  
30

1 dismissed because it is based on an entirely new legal theory which has been raised too late in  
2 these proceedings. Dkt. #146. With respect to Plaintiff's breach of contract claim, Plaintiff  
3 argues that Defendants have breached a current contract by failing to pay certain fees for  
4 services provided by Plaintiff to Defendants. Dkt. #117. Defendants respond that genuine  
5 disputes as to the material facts preclude summary judgment on the breach of contract claim  
6 and counterclaims. Dkt. #134. For the reasons set forth below, the Court now DENIES  
7 Plaintiff's Motion for Summary Judgment on Defendants' Counterclaims, DENIES Plaintiff's  
8 Motion for Summary Judgment on its Breach of Contract claim, and DENIES Plaintiff's  
9 Motion to Dismiss.

## 10 **II. BACKGROUND**

11 This breach of contract/trade secret matter was removed to this Court on April 11,  
12 2017. Dkt. #1. According to the initial Complaint, Defendant NextAlarm, LLC  
13 ("NextAlarm") and Plaintiff Cen Com, Inc. ("Cen Com") are businesses in the alarm-  
14 monitoring industry. Dkt. #1-2 at ¶¶ 1.1 and 1.2. The parties worked together for several  
15 years. *Id.* at ¶ 4.4. That business relationship allowed Cen Com to monitor NextAlarm  
16 accounts and respond to signals from those accounts to summon the appropriate first  
17 responders. *Id.* Cen Com contends that while providing those services, its employees  
18 learned that NextAlarm lacked crucial and commercially valuable information/data  
19 regarding NextAlarm customers. *See* ¶¶ 4.6-4.7. Cen Com allegedly acquired that missing  
20 information/data while providing services for NextAlarm. *Id.* When NextAlarm notified  
21 Cen Com that Cen Com's services would no longer be needed, Cen Com offered to sell that  
22 data to NextAlarm, but a sale never materialized. Instead, the parties entered into a deal  
23  
24  
25  
26  
27  
28  
29  
30

1 whereby Cen Com agreed to act solely as an intermediary by forwarding NextAlarm signals  
2 to a new vendor whose live operators would dispatch emergency services or contact  
3 customers as needed. *Id.* at ¶ 4.8 and Ex. A thereto. The agreement required NextAlarm to  
4 use reasonable efforts to ensure that the new vendor did not use Cen Com's data for  
5 improper purposes. *Id.* and ¶ 4.10.  
6

7  
8 On March 7, 2018, this Court granted Defendants' Motion for Judgment on the  
9 pleadings. Dkt. #60. The Court determined that Plaintiff's Claims 1-9 and 11 were  
10 displaced by the UTSA. *Id.* The Court left Plaintiff's claim for Vicarious Liability,  
11 recognizing that was a general theory of liability rather than a separate claim. Thus, the  
12 only remaining claim for litigation was one for trade secret misappropriation. *Id.* The  
13 Court then granted Plaintiff leave to amend.  
14

15  
16 On March 27, 2018, Plaintiff filed its Amended Complaint. Dkt. #73. Plaintiff  
17 continued to allege that:

18 defendant Numerex Corp., and its subsidiary NextAlarm, LLC,  
19 knowingly and willfully, in violation of its legal and contractual duties,  
20 independently, and together with a non-party, Amcest Corporation,  
21 improperly accessed, took, used, and gained the benefit of confidential,  
22 proprietary, and valuable data from and owned by the plaintiff Cen  
23 Com, Inc., including but not limited to Cen Com's trade secret  
24 information, subscriber data, and other valuable, proprietary data.

25 Dkt. #73 at ¶ ¶ 1.1 and 4.1. Based on those allegations, *inter alia*, Plaintiff asserted ten  
26 claims against Defendants, including claims for breach of contract, negligence,  
27 fraud/misrepresentation, negligent misrepresentation, conversion, violation of Washington's  
28 CPA, unjust enrichment, aiding and abetting, civil conspiracy and vicarious liability. *Id.* at  
29  
30

¶ 5.1-14.2. It no longer asserted a claim for trade secret misappropriation under the UTSA. Defendants then moved to dismiss the Amended Complaint. Dkt. #76.

On May 17, 2018, this Court granted in part Defendants' motion to dismiss. Dkt. #111. In that Order, the Court found that Washington's trade secret laws displaced all of Plaintiff's theories of liability, with the exception of the portion of Claim One for breach of contract on the basis that Defendants failed to pay certain fees and/or make timely payments as required by the contract. *Id.* The instant motions followed.

### III. DISCUSSION

#### A. Legal Standards

##### 1. Summary Judgment

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but "only determine[s] whether there is a genuine issue for trial." *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *Federal Deposit Ins. Corp. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992)). Material facts are those which might affect the outcome of the suit under governing law. *Anderson*, 477 U.S. at 248.

The Court must draw all reasonable inferences in favor of the non-moving party. See *O'Melveny & Meyers*, 969 F.2d at 747, *rev'd on other grounds*, 512 U.S. 79 (1994). However, the nonmoving party must make a "sufficient showing on an essential element of her case with respect to which she has the burden of proof" to survive summary judgment.

1 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Further, “[t]he mere existence of a  
2 scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be  
3 evidence on which the jury could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at  
4 251.

6           2. *Motions to Dismiss*

7           In deciding a 12(b)(6) motion, this Court is limited to the allegations on the face of  
8 the Complaint (including documents attached thereto), matters which are properly judicially  
9 noticeable and other extrinsic documents when “the plaintiff’s claim depends on the  
10 contents of a document, the defendant attaches the document to its motion to dismiss, and  
11 the parties do not dispute the authenticity of the document, even though the plaintiff does  
12 not explicitly allege the contents of that document in the complaint.” *Knieval v. ESPN*, 393  
13 F.3d 1068, 1076 (9th Cir. 2005). The Court must construe the complaint in the light most  
14 favorable to the Plaintiff and must accept all factual allegations as true. *Cahill v. Liberty*  
15 *Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The Court must also accept as true  
16 all reasonable inferences to be drawn from the material allegations in the Complaint. *See*  
17 *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247-48 (9th Cir. 2013); *Pareto v. F.D.I.C.*, 139  
18 F.3d 696, 699 (9th Cir. 1998). However, the Court is not required to accept as true a “legal  
19 conclusion couched as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
20 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

26           **B. Operative Pleading**

27           As an initial matter, the Court finds it necessary to make clear the operative pleading  
28 as related to these motions, as Plaintiff filed its motions seeking summary judgment on  
29  
30

1 counterclaims raised in a pleading that was moot and has since been superseded.<sup>1</sup> The  
2 Court could deny Plaintiff's motion for summary judgment on Defendants' counterclaims  
3 on that basis. However, given that the Counterclaims in the now-operative Answer to  
4 Plaintiff's Amended Complaint are nearly identical to those addressed by Plaintiff in its  
5 motion, and since Plaintiff has also filed a motion to dismiss after the Answer to the  
6 Amended Complaint was filed, the Court will address the motions together for the sake of  
7 efficiency and judicial economy.<sup>2</sup> Compare Dkt. #2 at Counterclaims, ¶¶ 23-65 with Dkt.  
8 #128 at Counterclaims, ¶¶ 21-63.

### 9 **C. Defendants' Counterclaims**

10 Defendants have asserted six Counterclaims against Plaintiffs. Dkt. #128 at ¶¶ 21-  
11 63. The Court addresses each claim, in turn, as follows.

#### 12 *1. Intentional Interference with Tom Reed Contract*

13 In their First Counterclaim, Defendants allege that Plaintiff intentionally interfered  
14 with Defendants' contractual relations with Tom Reed. Dkt. #128 at ¶¶ 21-27. Mr. Reed is  
15

---

16  
17  
18  
19  
20  
21  
22 <sup>1</sup> The Court presumes Plaintiff filed its motion prior to an Answer to the Amended  
23 Complaint because the Court-imposed deadline for dispositive motions was about to pass.  
24 See Dkt. #20. At the time Plaintiff filed the instant motions for summary judgment, it had  
25 filed an Amended Complaint, Defendants had moved to dismiss the claims in that complaint,  
26 and the Court had granted in part the motion to dismiss. See Dkt. #111. Thus, Defendants  
27 were required to file an Answer to the Amended Complaint within 14 days of the Court's  
28 Order, which would have been after the dispositive motion deadline of May 22, 2018. Fed.  
29 R. Civ. P. 12(a)(4)(A).

30 <sup>2</sup> Indeed the sole difference between the Counterclaims appears to be an amended basis for  
Defendants' Washington Consumer Protection Act Counterclaim, which now references  
alleged deceptive billing practices. Compare Dkt. #2 at Counterclaims, ¶ 60 with Dkt. #128  
at Counterclaims, ¶ 58.

1 a former employee of Defendants' who went to work for Plaintiff in 2016. Specifically,  
2 Defendants allege:

3  
4 19. Cen Com has also stole [sic] business from NextAlarm in an  
5 attempt to force Numurex [sic] to sell the NextAlarm brand to Cen Com  
6 at a reduced valuation.

7 20. Support for this allegation is derived from the fact that NextAlarm  
8 hired Tom Reed (a key NextAlarm employee) and used his knowledge  
9 of the NextAlarm business to solicit NextAlarm customers in violation  
10 of restrictive covenants which forbade Mr. Reed from disclosing  
11 company information and forbade him from competing with NextAlarm.  
12 Additional support is derived from circumstance:

13 a. Active NextAlarm customers terminated their alarm  
14 monitoring agreements and contracted with Cen Com for  
15 similar services shortly after Tom Reed resigned from Next  
16 Alarm;

17 b. Active NextAlarm customers were contacted by Cen  
18 Com through email addresses that those customers created for  
19 the sole purpose of communicating with NextAlarm;

20 c. Cen Com impermissibly used NextAlarm's federally  
21 registered trademark in Internet and email advertisements that  
22 deceptively suggest Cen Com, Numerex and NextAlarm are  
23 joint partners, ventures, or otherwise engaged in concerted  
24 efforts to sell services under the federally registered  
25 NEXTALARM service mark. *Compare* Trademark  
26 Registration Number 4784209 with Your NextAlarm Partner,  
27 <http://www.nextalarmpartner.com/home.html> (last visited,  
28 March 30, 2017, at 1:29 PM).

29 ...

30 22. NextAlarm alleges that the aforesaid conduct of Cen Com  
constitutes intentional tortious interference with NextAlarm's  
contractual relations.

23. NextAlarm had a valid contractual relationship with Tom Reed.

24. Cen Com had knowledge of NextAlarm's valid contractual  
relationship with Tom Reed.

1  
2 25. Cen Com's aforesaid acts intentionally interfered with NextAlarm's  
3 contract with Tom Reed and caused or induced Reed to breach his  
4 contract with NextAlarm.

5 26. Cen Com's aforesaid acts were committed for an improper purpose  
6 and were accomplished through improper means.

7 27. NextAlarm has suffered damages proximately caused by Cen  
8 Com's aforesaid acts in an amount to be proven at trial.

9 Dkt. #128 at ¶¶ 22-27. Plaintiff asserts that this claim must be dismissed on summary  
10 judgment because Defendants cannot prove a valid contractual relationship with Mr. Reed,  
11 and they cannot prove that Plaintiff intentionally induced a breach or termination of the  
12 relationship. Dkt. #112 at 8.

13 To the extent that the Counterclaim rests on Mr. Reed's non-compete/non-  
14 solicitation clauses of his contract, Defendants agree that the counterclaim should be  
15 dismissed. Dkt. #134 at 13. However, Defendants argue that Plaintiff fails to address Mr.  
16 Reed's contract to the extent that he allegedly disclosed confidential information to allow  
17 Plaintiff to steal Defendants' business. *Id.*

18 To establish a claim of tortious interference, the plaintiff must prove five elements:  
19 (1) the existence of a valid contractual relationship, (2) the defendant(s) had knowledge of  
20 that relationship, (3) an intentional interference inducing or causing a breach or termination  
21 of the relationship, (4) that defendants interfered for an improper purpose or used improper  
22 means, and (5) resultant damage. *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins.*  
23 *Grp., Inc.*, 114 Wn. App. 151, 157-58, 52 P.3d 30 (2002). Because Plaintiff moves for  
24 summary judgment on the basis that the contract was not valid, this Court first reviews Mr.  
25 Reed's contract with respect to that question. *See* Dkt. #115, Ex. J.



1 As an initial matter, the Court notes that Mr. Reed’s contract contains a Choice of  
2 Law clause providing that it shall be governed by the laws of the State of Georgia. Dkt.  
3 #115, Ex. J at ¶ 10. However, the Wholesale Alarm Monitoring Agreement with Alarm  
4 Partner Orphan and Billing Provisions contains a “Legal Action” provision in which  
5 NextAlarm LLC agreed that the laws of the state of Washington control that agreement **and**  
6 **any other agreement between the parties or with any third party** arising from the  
7 relationship between Plaintiff and Defendant. Dkt. #115, Ex. G at ¶ 22. This is problematic  
8 because neither of the parties have addressed the appropriate law to apply to the Mr. Reed’s  
9 contract, although both parties appear to rely on Washington law.  
10

11  
12  
13 Further, to resolve whether the contract was valid at the time in question, the Court  
14 would need to construe several provisions in the contract, and the construction principles  
15 between Georgia and Washington state law vary. For example, under Washington law,  
16 when interpreting a written contract, the intent of the contracting parties controls. *Dice v.*  
17 *City of Montesano*, 131 Wn.App. 675, 683-84, 128 P.3d 1253 (2006). Washington follows  
18 the “objective manifestation theory” of contract interpretation, under which determining the  
19 parties’ intent begins with a focus on the reasonable meaning of the contract language.  
20  
21 *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005).  
22 Contracts are considered as a whole, interpreting particular language in the context of other  
23 contract provisions. *See Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654,  
24 669-70, 15 P.3d 115 (2000). Words are generally given their ordinary, usual, and popular  
25 meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Hearst*,  
26 154 Wn.2d at 504. Under Georgia state law:  
27  
28  
29  
30

1 It is well established that contract construction entails a three-step  
2 process, beginning with the trial court's determination as to whether  
3 the language is clear and unambiguous. If no construction is required  
4 because the language is clear, the court then enforces the contract  
5 according to its terms. But if there is ambiguity in some respect, the  
6 court then proceeds to the second step, which is to apply the rules of  
7 contract construction to resolve the ambiguity. Finally, in the third  
8 step, if the ambiguity remains after applying the rules of construction,  
9 the issue of what the ambiguous language means and what the parties  
10 intended must be resolved by a jury. Importantly, as an initial  
11 matter, the existence or nonexistence of an ambiguity is a question of  
12 law for the court. Should the court determine that ambiguity exists, a  
13 jury question does not automatically arise, but rather the court must  
14 first attempt to resolve the ambiguity by applying the rules of  
15 construction in OCGA § 13-2-2.

16 *Fannie Mae v. Las Colinas Apartments, LLC*, 815 S.E. 2d 334, 337, 2018 Ga. App. LEXIS  
17 434, \*4-5 (2018).

18 As a result of the parties' failure to address the choice of law question and the  
19 appropriate standard under which to construe the contract at issue, the Court finds summary  
20 judgment dismissal of this Counterclaim inappropriate, and Plaintiff's motion for summary  
21 judgment on Defendants' First Counterclaim will be denied.

## 22 2. *Intentional Interference with Defendants' Subscription Contracts*

23 In their Second Counterclaim, Defendants allege that Plaintiff intentionally  
24 interfered with Defendants' customer subscription contracts. Dkt. #128 at ¶¶ 28-34.  
25 Plaintiff asserts that this claim should be dismissed because a 2016 Nondisclosure  
26 Agreement ("NDA") allows it to directly solicit certain accounts, and therefore Defendants  
27 cannot prove that Plaintiff interfered with an expected client subscription contract for an  
28 improper purpose or by improper means. Dkt. #112 at 11. Defendants respond that the  
29 NDA allowed Plaintiff only to solicit certain inactive or canceled accounts, which  
30

1 Defendants never provided to Plaintiff. Dkt. #134 at 12. Thus, Defendants assert that  
2 summary dismissal is not appropriate. The Court agrees.

3  
4 Defendants have produced evidence that it never delivered to Plaintiff any list of  
5 inactive or canceled accounts. Dkt. #135, Ex. 16 at 74:20-76:17. This is sufficient to raise  
6 a genuine dispute as to a material fact – whether Plaintiff had the right to solicit certain  
7 customers at issue. Accordingly, the Court finds summary judgment dismissal of this  
8 Counterclaim inappropriate, and Plaintiff’s motion for summary judgment on Defendants’  
9 Second Counterclaim will be denied.  
10

11  
12 *3. Infringement of a Federally Registered Trademark Under 15 U.S.C. §*  
13 *1114(1)(A) and Federal Unfair Competition and False Designation of Origin*  
*Under 15 U.S.C. § 1125(A)*

14 In their Third Counterclaim, Defendants allege that Plaintiff has willfully infringed  
15 the NextAlarm mark in violation of 15 U.S.C. § 1114(1)(A). Dkt. #128 at ¶¶ 35-43. In  
16 their Fourth Counterclaim, Defendants allege that Plaintiff has willfully attempted to trade  
17 or engage in commerce based on the good will associated with the NextAlarm mark, and  
18 has thereby deprived Defendants of the ability to control the consumer perception of their  
19 goods and service under that mark, in violation of 15 U.S.C. § 1125(A). Dkt. #128 at ¶¶  
20 44-49. Plaintiff asserts that both of these Counterclaims should be dismissed because it was  
21 the authorized licensee/assignee of the NextAlarm mark and was authorized to solicit  
22 customers with it. Dkt. #112 at 12. Further, Plaintiff asserts that Defendants are not  
23 “owners of the mark” for purposes of their Counterclaims. *Id.* at 13. Defendants respond  
24 that its claims rest on the same clause under which Plaintiff was permitted to solicit certain  
25 inactive or canceled accounts, and that Plaintiff confuses a license to use the name  
26  
27  
28  
29  
30

1 “NextAlarm Alarm Partner” for such solicitation with a wholesale assignment of the mark.  
2 Dkt. #134 at 10-12.

3  
4 As with Counterclaim Two, Defendants have produced evidence that it never  
5 delivered to Plaintiff any list of inactive or canceled accounts. Dkt. #135, Ex. 16 at 74:20-  
6 76:17. Further, Defendants have produced evidence that Plaintiff continued to use the mark  
7 after the license was terminated. Dkt. #134 at 11. This is sufficient to raise a genuine  
8 dispute as to material facts – whether Plaintiff had the right to solicit certain customers at  
9 issue and whether Plaintiff improperly used the mark after the agreement was terminated.  
10 Accordingly, the Court finds summary judgment dismissal of these Counterclaims  
11 inappropriate, and Plaintiff’s motion for summary judgment on Defendants’ Third and  
12 Fourth Counterclaims will be denied.  
13  
14

15  
16 *4. Violation of the Anti-Cybersquatting Consumer Protection Act Under 15 U.S.C.*  
17 *§ 1125(D)*

18 In their Fifth Counterclaim, Defendants allege that Plaintiff has unlawfully used an  
19 internet domain name including the federally registered NextAlarm mark in violation of 15  
20 U.S.C. § 1125(D). Dkt. #128 at ¶¶ 50-56. This Counterclaim involves the same provision  
21 described above, allowing Plaintiff to solicit certain inactive or canceled accounts. As with  
22 Counterclaims Two-Five, Defendants have produced evidence that it never delivered to  
23 Plaintiff any list of inactive or canceled accounts. Dkt. #135, Ex. 16 at 74:20-76:17.  
24 Further, Defendants produce evidence that Plaintiff continued to use the mark/internet  
25 domain after the license was terminated. Dkt. #134 at 11. This is sufficient to raise a  
26 genuine dispute as to material facts – whether Plaintiff had the right to solicit certain  
27 customers at issue and whether Plaintiff improperly used the mark after the agreement was  
28  
29  
30

1 terminated. Accordingly, the Court finds summary judgment dismissal of these  
2 Counterclaims inappropriate, and Plaintiff's motion for summary judgment on Defendants'  
3 Fifth Counterclaim will be denied.  
4

5 *5. Violation of the Washington Consumer Protection Act Under RCW § 19.86, et*  
6 *seq.*

7 Finally, in their Sixth Counterclaim, Defendants allege that Plaintiff has violated  
8 Washington's Consumer Protection Act by engaging in the above described infringements  
9 and in deceptive billing practices. Dkt. #128 at ¶¶ 57-63. Plaintiff asks the Court to strike  
10 this Counterclaim on the basis that it raises an untimely, new theory as the basis of the  
11 claim, without seeking leave of the Court. Dkt. #146. For the reasons set forth by  
12 Defendants, dkt. #159 at ¶¶ 2-5, the Court disagrees that the portion of the CPA claim  
13 relying on unfair billing practices is untimely, and the Court will deny Plaintiff's motion to  
14 dismiss that portion of the claim. Moreover, the Court finds that genuine disputes of  
15 material fact exist as to the public interest element of the claim, particularly given the  
16 evidence provided by Defendants regarding other consumer complaints across the country.  
17 Dkt. #159 at ¶¶ 3-7 and Exhibits thereto.  
18  
19  
20  
21

22 With respect to the portion of the CPA claim resting on alleged trademark  
23 infringements, the Court has already determined that genuine disputes as to material facts  
24 preclude summary judgment. Therefore, to the extent that the Sixth Counterclaim relies on  
25 alleged infringements, that portion of the Counterclaim will not be dismissed, and  
26 Plaintiff's request for summary judgment on that Counterclaim will be denied.  
27

28 ///

29 ///

1           6. *Defendants' Motion to Strike*

2           Defendants' have moved to strike Plaintiff's contemporaneously-filed summary  
3 judgment motions on the basis that such filing violates the Court's Local Rules. Dkt. #134  
4 at 14. The Court declines to strike the motions.  
5

6           **D. Plaintiff's Breach of Contract Claim**

7           The Court next turns to Plaintiff's motion for partial summary judgment on its  
8 breach of contract claim. Dkt. #117 (filed under seal). Specifically, Plaintiff asserts that  
9 because "Defendants admit the 2016 Alarm Delivery Contract requires them to pay fees and  
10 charges for services rendered under it by ADM[;] Defendants admit [Plaintiff] continues to  
11 provide services under the 2016 Alarm Delivery Contract[; and] Defendants admit they  
12 have not satisfied all outstanding invoices for services rendered by [Plaintiff,] . . . no  
13 reasonable jury could return a verdict for Defendants on the issue of breach[,] and summary  
14 judgment for [Plaintiff] is proper." Dkt. #117 at 1. Defendants oppose the motion,  
15 responding that questions of fact with respect to their affirmative defenses of duress and  
16 unclean hands preclude summary judgment. Dkt. #134 at 3-9. For the reasons discussed  
17 herein, the Court DENIES Plaintiff's motion.  
18

19           In its motion for summary judgment, Plaintiff generally argues that there are  
20 outstanding invoices that are required to be paid under the governing contract between the  
21 parties, and that there is no dispute those invoices have not been paid; therefore, Plaintiff  
22 asserts that its breach of contract claim should be granted. Dkt. #117. The contract at issue  
23 is governed by Washington state law. Dkt. #115, Ex. F at ¶ 21. In order to succeed on a  
24 breach of contract claim under Washington law, a plaintiff must prove (1) a valid contract  
25  
26  
27  
28  
29  
30

1 term between parties imposing a duty, (2) a breach of that duty, and (3) resulting damages.  
2 *See Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 899 P.2d 6, 9  
3 (Wash. Ct. App. 1995); Washington Pattern Jury Instructions No. 300.01 (6th ed. 2013).  
4

5 However, Plaintiff's claim fails before the Court even reaches an analysis of the  
6 substantive arguments. This is because Plaintiff fails to identify the specific provision or  
7 provisions of the contract that have been breached, and how the evidence in the record  
8 proves such a breach. *See* Dkt. #117 at 8-9. In fact, Plaintiff fails to even identify in the  
9 record the alleged outstanding invoices that remain to be paid. *Id.* and Dkt. #115. On  
10 summary judgment, it is not enough for Plaintiff to rely on general averments. The moving  
11 party bears the initial burden of showing an absence of any genuine issues of material fact.  
12 *Celotex v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Plaintiff has not  
13 satisfied that burden. Accordingly, Plaintiff's motion will be denied.  
14  
15  
16

#### 17 **E. Defendants' Motion to Seal**

18 The Court next addresses Defendants' motion to seal portions of its opposition to  
19 Plaintiff's motion to dismiss and the accompanying Declaration and exhibits supporting  
20 those portions of that brief. Dkt. #155. Defendants have asked to file that material under  
21 seal pursuant to the parties' Protective Order in this matter, as Plaintiff has marked those  
22 materials "highly confidential-attorney's eyes only." Dkt. #159, Exs. 1-7. However,  
23 Defendants do not believe the material should be sealed. Under the Court's Local Civil  
24 Rules, "the party who designated the document confidential must satisfy subpart (3)(B) in  
25 its response to the motion to seal or in a stipulated motion." LCR 5(g)(3). Thus, Plaintiff  
26 bears the burden on this motion.  
27  
28  
29  
30

1 “There is a strong presumption of public access to the court’s files.” LCR 5(g)(2).  
2 For dispositive motions, parties must make a “compelling showing” that the public’s right of  
3 access is outweighed by the parties’ interest in protecting the documents. “In general,  
4 ‘compelling reasons’ sufficient to outweigh the public’s interest in disclosure and justify  
5 sealing court records exist when such court files might have become a vehicle for improper  
6 purposes, such as the use of records to gratify private spite, promote public scandal, circulate  
7 libelous statements, or release trade secrets.” *Kamakana v. City and County of Honolulu*,  
8 447 F.3d 1172, 1179 (9th Cir. 2006) (internal citations omitted). “The mere fact that the  
9 production of records may lead to a litigant’s embarrassment, incrimination, or exposure to  
10 further litigation will not, without more, compel the court to seal its records.” *Id.* (citing  
11 *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir. 2003)). Further, the  
12 Court will not grant broad authority to file documents under seal simply because the parties  
13 have designated them as confidential in the course of discovery. *Kamakana*, 447 F. 3d at  
14 1183. “If possible, a party should protect sensitive information by redacting documents  
15 rather than seeking to file them under seal.” CR 5(g)(3). Thus, “the motion or stipulation to  
16 seal should include an explanation of why redaction is not feasible.” *Id.*

17  
18 In this case the material at issue involves consumer complaints that Defendants wish  
19 to use in support of its CPA counterclaim. Plaintiff argues that these materials should  
20 remain sealed because they involve private, non-party interests, involve settlement  
21 communications between Plaintiff and different Attorney General’s Offices, and because  
22 they are only being offered for improper purposes. Dkt. #162. The Court is not persuaded.  
23  
24  
25  
26  
27  
28  
29  
30



1 First, Plaintiff fails to convince the Court that these materials contain private  
2 consumer interests. Nothing about the types of complaints made to a state Attorney  
3 General's office suggests that the consumers believed the information would be private or  
4 should be kept private. Indeed, in many cases, the consumers were specifically seeking an  
5 investigation by the state agency. Second, Plaintiff misconstrues FRE 408 regarding  
6 settlement discussions. That Rule precludes evidence of an offer-to compromise as an  
7 admission of, as the case may be, the validity or invalidity of the claim. FRE 408.  
8 However, the evidence is allowed for other purposes. FRE 408(b). Thus, the Court does  
9 not believe the materials should be sealed under Rule 408. Finally, the Court is not  
10 convinced that the materials are sources of information that might harm Plaintiff's  
11 competitive standing in the industry. *See* Dkt. #162 at 10. Indeed, Plaintiff simply makes a  
12 blanket statement that such is the case, without explaining how or why the materials would  
13 be harmful. Moreover, many of these materials are more than two years old, and Plaintiff  
14 fails to explain how the passage of time has not diminished any competitive affect.  
15

16  
17 The Court acknowledges that this material is likely embarrassing to Plaintiff.  
18 However, as noted above, "[t]he mere fact that the production of records may lead to a  
19 litigant's embarrassment, incrimination, or exposure to further litigation will not, without  
20 more, compel the court to seal its records." *Kamakana*, 447 F. 3d at 1179. Accordingly,  
21 Defendants' motion to seal will be denied.  
22

#### 23 **F. Sanctions**

24 On June 18, 2018, this Court directed Plaintiff to show cause why sanctions should  
25 not be entered against it for violating the parties' Stipulated Protective Order and the  
26

1 Court's Local Rules by filing several motion, briefs and Declarations under seal without  
2 moving to do so. Dkt. #148. The Court also noted that this is not the first time Plaintiff has  
3 violated a Protective Order or the Court's Local Rules. *Id.* In response, Plaintiff states that  
4 it failed to file contemporaneous motions to seal because it believed it was not required to  
5 do so. Dkt. #160 at 4. While the Court does not believe that there is anything unclear about  
6 the requirements of either the parties' Stipulated Protective Order or Local Civil Rule 5(g),  
7 the Court will not impose sanctions at this time. However, this serves as a warning to  
8 Plaintiff to again familiarize itself with the Court's Orders, Rules and procedures to avoid  
9 potential future sanctions. For the reasons set forth by Defendant in its response to the  
10 Order to show cause, the documents at issue shall remain sealed. *See* Dkts. #165 and #166.

#### 14 IV. CONCLUSION

15 Having reviewed Plaintiff's Motions for Summary Judgment and to Dismiss, the  
16 Opposition thereto and Reply in support thereof, along with the supporting Declaration and  
17 Exhibits and the remainder of the record, the Court hereby finds and ORDERS:  
18

- 19 1. Plaintiff's Motion for Summary Judgment (Dkt. #112) is DENIED as discussed  
20 above.  
21
- 22 2. Plaintiff's Partial Motion for Summary Judgment on the breach of contract claim  
23 (Dkt. #117) is DENIED.  
24
- 25 3. Plaintiff's Motion to Dismiss or Strike Counterclaims (Dkt. #146) is DENIED.  
26
- 27 4. Defendant's Motion to Seal (Dkt. #155) is DENIED. The Court shall unseal  
28 Defendants' Opposition to Plaintiff's Motion to Dismiss located at Dkt. #157, along  
29 with the Declarations and Exhibits in support thereof located at Dkt. #159.  
30

DATED this 31st day of August, 2018.



RICARDO S. MARTINEZ  
CHIEF UNITED STATES DISTRICT JUDGE